OAH Docket No. 8-1800-19127-1
Governor's Tracking No. AR 309

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Amendments to Rules Governing Surveillance and Integrity Review Section (SIRS), *Minnesota Rules*, Chapter 9505.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Eric L. Lipman conducted a hearing concerning the above rules beginning at 10:00 a.m. on October 31, 2007, in Room 2380, Elmer L. Anderson Building, 540 Cedar Street, St. Paul, Minnesota. The hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a larger rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable; that they are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published are within the scope of the matter that was originally announced.

When a sufficient number of persons request that a hearing be held regarding the proposed rules, state law likewise provides for a hearing. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings (OAH), an agency that is independent of the Department of Human Services (Department or DHS).

The members of the Department's hearing panel were Robert Klukas, DHS Legal Analyst; Patricia Sonnenberg, Assistant Attorney General; James McRae, Jr., Ph.D, DHS Senior Research Scientist; and Constance A. Jacobs, Staff Attorney. Twenty-seven members of the public signed the hearing register and ten members of the public spoke at the hearing.

The Department received a number of written comments on the proposed rules before the hearing. After the hearing, the record remained open for 20 calendar days, until November 20, 2007, to allow interested persons and the Department an opportunity to submit written comments. Following the initial comment period, the

[1] Minn. Stat. §§ 14.131 through 14.20.

record remained open for an additional five business days to allow interested persons and the Department the opportunity to file a written response to the comments submitted. The OAH hearing record closed on November 29, 2007. All of the comments received by the Administrative Law Judge were read closely and carefully considered.

SUMMARY OF CONCLUSIONS

The Department has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable, with three exceptions as detailed in Findings 69, 84 and 97.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Nature of the Proposed Rules

1. This rulemaking proceeding involves revising the rules governing the Surveillance Integrity Review Section (SIRS).[2] The Department's SIRS group monitors compliance with health service program requirements; identifies fraud, theft, error, or abuse by providers or recipients; establishes administrative and legal penalties in cases of fraud, theft, error, or abuse; and investigates and monitors compliance with federal and state laws and regulations that govern health and human services programs.[3] Some of those programs include Medical Assistance (MA), General Assistance Medical Care (GAMC), MinnesotaCare, and the Consolidated Chemical Dependency Treatment Fund. Specifically, the federal government requires the Department to investigate and report fraud and abuse in the programs that are funded through MA.[4]

2. The Department first adopted rules in this area in 1981. Since that time, the rules have been amended or renumbered three times, with the last revision occurring in 1995.

3. The proposed amendments would modify the SIRS rules in several ways. They would: Clarify the meaning of the terms "abuse" and "lock out;" set standards for the restricted recipient program; set standards for electronically stored data; improve and clarify record requirements for medical transportation services, durable medical equipment, rehabilitative and therapeutic services, personal care providers services, school-based services, and language interpreter services; delete obsolete references; repeal conflicting requirements; clarify standards for the use of random sample extrapolation in monetary recovery; and update the references to related policies.

4. In developing the proposed rules, the Department published two Requests for Comments in the State Register. The Department also formed an advisory

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[2] These rules are also colloquially known as "Rule 64" or the "SIRS Rule."

[3] *See,* Exhibit C (Statement of Need and Reasonableness or "SONAR") at 1.

[4] *See,* 42 C.F.R. §§ 456.3 and 455.1 (2006); *see also,* SONAR at 2.

committee comprised of persons who represented interest groups affected by the possible rule amendments. The advisory committee met four times between February and June of 2004. In addition, the Department worked with officials of the Minnesota Department of Education in order to address concerns about documentation required of vendors who provide transportation to disabled students.[5]

Procedural Requirements of Chapter 14

5. On November 17, 1997, the Department published a Request for Comments on Planned Amendments to Rules Governing Use of Random Sample Extrapolation in Monetary Recovery. The Request indicated that the Department was considering amending the rules to make them "more useable and less cumbersome." The planned amendment would allow the Department's SIRS program to use "an appropriately statistically reliable random sampling technique to calculate the amount of a monetary recovery due from a vendor." The Request for Comments was published at 22 *State Register* 884.[6]

6. On April 2, 2007, the Department published a Revised Request for Comments on Possible Amendment to and Repeal of Rules Governing Surveillance and Integrity Review. The Revised Request indicated that the Department had expanded the scope of the proposed amendments to also include several other parts of the SIRS rules. Generally, the planned amendments would conform with changes to related laws and regulations; keep pace with changes in health care practices and medical records; and improve the Department's ability to protect the integrity of state operated health care programs. The proposed rules would also improve standards for provider records. The Request for Comments was published at 31 *State Register* 1369.[7]

7. By letter dated July 23, 2007, the Department requested that the Office of Administrative Hearings schedule a hearing and assign an Administrative Law Judge. The Department also filed a proposed Dual Notice, a copy of the proposed rules, and a draft of the Statement of Need and Reasonableness (SONAR).

8. In a letter dated August 1, 2007, Administrative Law Judge Eric L. Lipman approved the Department's Dual Notice and Additional Notice Plan, requiring the addition of three individuals to the Additional Notice Plan.[8]

9. On September 13, 2007, the Department mailed the Dual Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all persons identified in the additional notice plan. The Dual Notice stated that a free copy of the proposed rules was available upon request from the agency contact person.[9]

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[5] *See,* SONAR at 1 and 22.

[6] Ex. A; Minn. Stat. § 14.101.

[7] Ex. A; Minn. Stat. § 14.101.

[8] Ex. G.

[9] Ex. F.

10. On September 13, 2007, the Department sent a copy of the Dual Notice and Statement of Need and Reasonableness to the legislators specified in Minn. Stat. § 14.116.[10]

11. On September 13, 2007, the Department mailed a copy of the Statement of Need and Reasonableness to the Legislative Reference Library.[11]

12. On September 17, 2007, the proposed rule and the Dual Notice of Hearing were published at 32 *State Register* 487.[12]

13. On the day of the hearing the following documents were placed in the record:

- The Request for Comments published November 17, 1997 at 22 SR 884 and the Revised Request for Comments published April 2, 2007 at 31 SR 1369 (Ex. A);
- A copy of the proposed rules with Revisor's approval dated July 19, 2007 (Ex. B);
- A copy of the Statement of Need and Reasonableness (SONAR) dated August 30, 2007 (Ex. C);
- A copy of the transmittal letter showing the agency sent a copy of the SONAR to the Legislative Reference Library and Certificate of Mailing (Ex. D);
- The Dual Notice of Hearing as mailed and as published in the State Register at 32 SR 487 (Ex. E);
- Certificate of Mailing the Dual Notice of Hearing to the Rulemaking Mailing List dated September 13, 2007, and Certificate of Accuracy of the Mailing List (Ex. F);
- Copy of letter from OAH approving Additional Notice Plan, with modifications, and Dual Notice (Ex. G);
- Written comments on the proposed rules received by the agency during the comment period (Ex. H);
- A copy of the letter showing the agency sent a copy of the Dual Notice and SONAR to legislators and Certificate of Mailing (Ex. I);
- Notice of Hearing to those who requested a hearing (letter, certificate of mailing, and mailing list) (Ex. J);
- Written comments on the proposed rules received by the agency during the comment period (Ex. K); and

[10] Ex. I.

[11] Ex. D.

[12] Ex. E.

- Statistical Justification for Changes to Sampling (Ex. L).

Additional Notice

14. Minnesota Statutes §§ 14.131 and 14.23, require that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed rules. The Department submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it, with modifications, by letter dated August 1, 2007. In addition to notifying those persons on the Department's rulemaking list, the Department represented that it would also provide notice to the following groups and individuals:

- Minnesota Association County Social Service Administrators, Rules Subcommittee members;
- County board chairs of eighty-seven counties;
- the Agency Notice list;
- Advisory Committee members and individuals who requested to be on the mailing list for notices to the Advisory Committee;
- Individuals who requested notification about this rulemaking;
- Minnesota Health and Housing Association;
- Medical device suppliers;
- Personal care attendant associations;
- Minnesota Medical Association;
- Minnesota Dental Association;
- Kenneth Bence (Medica);
- Todd Bergstrom (Care Providers of Minnesota);
- Jonathan Lips (Care Providers of Minnesota);
- Mary E. Prentnieks (Minnesota State Bar Association);
- Julie Loftus (Minnesota State Bar Association);
- Rose Schafhauser (MAMES);
- Anne Henry (Minnesota Disability Law Center); and
- Rob Sauer (Health Partners, Inc.).

15. The Administrative Law Judge finds that the Department did give notice to those individuals contained in its Additional Notice Plan on September 13, 2007. Yet, the Department failed to submit a Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan into the record at the hearing, as required by Minn. R. 1400.2220, subp. 1, item H. This is a procedural defect in the rules. The Administrative Law Judge finds, however, that this was a harmless error under Minn. Stat. § 14.26, subd. (3)(d)(1), because no individual was deprived of the opportunity to participate in the rulemaking.

Statutory Authority

16. Minnesota Statutes section 256B.04, subdivision 2 requires the Department to create rules that carry out and enforce the law regarding the Medical

Assistance system. Minnesota Statutes section 256B.04, subdivision 10 requires the Commissioner to establish criteria and subsequent rule procedures for the investigation of fraud, theft, abuse, and other improper medical assistance claims. Minnesota Statutes section 256B.04, subdivision 15 requires the Department to establish a utilization review function, which guards against unnecessary and inappropriate use of medical assistance services, as well as excess payments for services. Minnesota Statutes section 256D.03, subdivision 7 and 256D.04 (2) require the Commissioner to adopt rules governing the General Assistance Medical Care Program, including rules for quality assurance, utilization review, and payments for medical services. Finally, Minnesota Statutes section 256L.02, subdivision 2 authorizes the Department to adopt rules to administer the MinnesotaCare program.

17. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules.

Regulatory Analysis in the SONAR

18. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

> **(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

Under the first factor, the rule amendments may affect everyone who provides or receives services through medical assistance, general assistance medical care, consolidated chemical dependency treatment, MinnesotaCare, or any other Department-administered health care program. The amendments may also affect recipients and vendors who participate in self-directed care programs.[13]

The Department expects that the rule amendments will not increase compliance costs for either providers or recipients. It asserts that the rule clarifies existing requirements and does not independently create new substantial costs.[14]

DHS argues that the random sample method is not an important source of costs, because this method is seldom used – apparently only twice during the past fifteen years. Further, in such cases, DHS posits that the amendment relating to random samples will lower costs, because the revised rule will not require large samples of claims in reviewed cases. Lastly, DHS contends that providers, recipients and the Department itself will benefit from the revised rule because the record-keeping standards in the proposed amendments are clearer than the existing standards.[15]

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[13] SONAR at 3.

[14] *Id.*

[15] *Id.*

(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

As for the second factor, the Department asserts that the rule amendments result in few or no changes to provider and recipients costs. The Department will not receive new revenue from these amendments.[16]

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The Department argues that the proposed rule amendments will strengthen its efforts to prevent fraud and abuse in the programs it administers. As noted above, Federal regulations require the Department to use surveillance and integrity review activity to detect fraud and abuse in the program.

Part 9505.2175 and the proposed amendments require providers to document goods and services provided to recipients. DHS argues that while documentation and record-keeping takes time, and presents a cost to providers, these efforts are necessary to determine the appropriateness and reasonableness of the services billed to the agency. Without proper documentation and records, DHS cannot make conclusions about the propriety of bills that it receives from providers. Further, DHS argues that the documents required under the amendments to Part 9505.2175 should not result in a significant cost to providers, because it is health care information that is routinely gathered by providers during the course of care.[17]

Finally, the Department argues that the random sample methods in the proposed rule amendment at part 9505.2220 should be less burdensome and costly for the Department than the random sample method in current use. The Department has only used the current method twice in the past and, if the proposed rule is enacted, has no plan to use the new method on any particular case. Thus it appears that, at worst, the amended random sample requirements will cause a slight change in costs. The Department concedes, however, that the other amendments will likely not result in any significant cost reductions.[18]

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

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[16] *Id.*

[17] *Id.*

[18] *Id.*

The Department did not pursue other methods of achieving the purpose of the proposed rule amendments because it is required by federal regulations to have a surveillance and integrity review system. The federal regulations require the Department to make detailed reports to the federal government as to the impact of fraud and abuse – the details of which could only be determined by reviewing documentation submitted by providers and investigating claims. Likewise, the federal regulations require the Department to recover improperly billed claims paid to vendors; recoveries which are only possible following a review of provider records.[19]

Similarly, Minnesota Statutes section 256B.04, subdivisions 2 and 15 require the Department to implement a system to determine whether fraud, abuse or error has occurred. Particularly because a referral to law enforcement authorities and a criminal prosecution may result from the Department's inquiries, a systematic method for obtaining and reviewing documentation from providers is necessary.[20]

(5) The probable costs of complying with the proposed rules.

The Department estimates that the costs of compliance with the proposed rule amendments will be negligible. The Department notes that following a direct solicitation of the members of the Rule Advisory Committee as to the likely costs of compliance with the proposed rules, only one Advisory Committee Member responded – observing that the proposed rules would likely have little or no impact on costs of compliance. The Department notes that the "advisory committee generally determined" that the requirements of the proposed rules were consistent with the current practices of providers.[21]

Moreover, while members of the Rule Advisory Committee urged several changes and clarifications to the proposed rules, none suggested that costs of complying with the revised rules would be substantial.[22]

(6) the probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The Department argues that failing to adopt the rule would create costs that would be borne by state government – particularly if Minnesota continues to use the random sample methods contained in the existing rule. In addition, DHS warns that if the Department does not maintain an effective surveillance and utilization review program, the sanction could be considerable. In order to receive federal funding for our

[19] *Id.*

[20] *Id.*

[21] *Id.* at 5.

[22] *Id.*

state's medical assistance program, Minnesota must maintain a federally-approved program to prevent fraud, abuse and error.[23]

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

As described above, regulations promulgated by the U.S. Department Health and Human Services establish a minimum set of standards for the required surveillance and utilization review program. The proposed rule amendments are in keeping with these minimum standards and fulfill the requirements of those regulations.[24]

The requirements in the proposed amendments that extend beyond the minimum federal standard are based upon separate requirements in the Minnesota Statutes. The Department argues that these amendments are also necessary and reasonable because they blend the requirements of state and federal statutes.[25]

Performance-Based Rules

19. The Administrative Procedure Act[26] also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[27]

20. The Department asserts that the proposed rules are performance-based, particularly in three areas: (1) the implementation of a new random sampling method; (2) the proposed clarifying language for the restricted recipient program; and (3) the revision of electronic data standards. The Department argues that the random sample amendments at part 9505.2220 will result in the greatest possible precision in determining an accurate amount of monetary recovery. Next, the Department states that the restricted recipient program amendments at part 9505.2238 will provide the recipient of health-related services with the necessary flexibility to make provider choices, while still ensuring the integrity of the program. Finally, the Department claims that the proposed electronic records requirements at part 9505.2197 allow the provider to use different storage systems for electronic records, so long as the provider's choice of system does not inhibit the Department's review functions.[28]

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Minn. Stat. § 14.131.

[27] Minn. Stat. § 14.002.

[28] SONAR at 6.

Consultation with the Commissioner of Finance

21. Under Minn. Stat. § 14.131, the agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

22. DHS consulted with the Commissioner of Finance via the Governor's Office. DHS sent the following documents on May 1, 2007, prior to its publication of the Dual Notice: (1) copies of the proposed rule, (2) the SONAR, and (3) a form—with cover letter—requesting formal review. DHS received the Department of Finance's comments on June 4, 2007. The Department of Finance stated that, based upon the information that was available, the proposed rule changes would have little fiscal impact on local units of government.[29]

23. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Analysis Under Minn. Stat. § 14.127

24. Effective July 1, 2005, under Minn. Stat. § 14.127, the Department must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[30] The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[31]

25. The Department's research demonstrated that the proposed rule amendments will not cost businesses with fewer than fifty employees or small city governments more than $25,000 in the first year of enactment.

26. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

Rulemaking Legal Standards

27. The delegation of rulemaking authority in favor of the Department in this instance is very broad. Under Minn. Stat. § 256B.04, subd. 2, the Legislature has instructed DHS to:

> Make uniform rules, not inconsistent with law, for carrying out and enforcing the provisions hereof in an efficient, economical, and impartial manner, and to the end that the medical assistance system may be administered uniformly

[29] *Id.* at 7.

[30] Minn. Stat. § 14.127, subd. 1 (2005).

[31] Minn. Stat. § 14.127, subd. 2 (2005).

throughout the state, having regard for varying costs of medical care in different parts of the state and the conditions in each case, and in all things to carry out the spirit and purpose of this program, which rules shall be furnished immediately to all county agencies, and shall be binding on such county agencies.

28. Further, under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely upon "legislative facts" – namely general facts concerning questions of law, policy and discretion – or it may rely upon its considered interpretation of a statute or stated policy preferences.[32] The Department prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Department representatives at the public hearing and in written post-hearing submissions.

29. The question of whether a rule has been shown to be reasonable focuses upon whether it has been shown to have a rational basis that is grounded in the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[33] An arbitrary or unreasonable agency action is an action without consideration of the facts and circumstances of the case.[34] Further, a rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[35]

30. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[36] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, because such a determination would invade the policy-making authority that has been delegated to the agency by the Minnesota Legislature. Accordingly, during a later review of the proposed rules, the inquiry is whether the choice made by the agency is one that a rational person could have made under the circumstances.[37]

31. In addition to need and reasonableness, the Administrative Law Judge must also assess other factors; namely: whether the agency has complied with rule

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[32] *See, Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[33] *See, In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 43 N.W.2d 281, 284 (Minn. 1950).

[34] *See, Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

[35] *See, Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. App. 1985).

[36] *See, Manufactured Housing Institute*, 347 N.W.2d at 244.

[37] *See, Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

adoption procedures; whether the rule grants undue discretion; whether the Department has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another entity; or whether the proposed language is not a rule.[38]

32. In this matter, the Department has proposed some revisions to the proposed rule language after the proposed rules were published in the *State Register*. Thus, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed.[39]

33. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced … in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the … notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."

34. Any substantive language that differs from the rule as published in the *State Register* has been assessed to determine whether the language is substantially different. Because some of the changes are not weighty or controversial, they are not separately set forth below. Any change that is not separately discussed below is found to be not substantially different from the rule as published in the *State Register*.

Analysis of the Proposed Rules

General

35. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise require a detailed examination. When rules are adequately supported by the SONAR, or the Department's oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other deficiencies that would prevent the adoption of those rules.

Discussion of Proposed Rules by Topic

Part 9505.2160, subpart 1
Part 9505.2200, subparts 1 and 4
Part 9505.2205, items A and B
Part 9505.2210, subpart 1

36. The Department is proposing to add "error" to the list of questionable practices that the Department's SIRS group is charged with identifying and

[38] Minn. R. 1400.2100 (2005).

[39] Minn. Stat. § 14.15, subd. 3 (2006).

investigating. This addition would extend the list to include fraud, theft, abuse or error. The Department argues that the change is necessary and reasonable to be consistent with the requirements of Minn. Stat. § 256B.064, subd. 1c, which states as follows:

> The commissioner may obtain monetary recovery from a vendor who has been improperly paid either as a result of conduct described in subdivision 1a or as a result of a vendor or department error, regardless of whether the error was intentional. Patterns need not be proven as a precondition to monetary recovery of erroneous or false claims, duplicate claims, claims for services not medically necessary, or claims based on false statements.[40]

37. Several commentators, including REM Minnesota ("REM"), Arc Greater Twin Cities and Arc Minnesota ("Arc"), Minnesota Disability Law Center ("MDLC"), Phoenix Medical Services, Inc., and Homeward Bound, expressed concern regarding the addition of "error" in the aforementioned rule parts. These commentators expressed concern that the Department had not adequately considered the implications of adding "error" to the rule and that the proposed language would permit the Department to sanction error as a criminal act.[41]

38. Specifically, Homeward Bound argued that the term "error" should be separately defined and took exception to the Department's position that the dictionary definition of the term was sufficiently clear. It recommended that the Department drop the word "error" from the proposed rules or, alternatively, withdraw the entire rule pending a more thorough integration of the concept of recovering for inadvertent errors into a revised rule.[42]

39. MDLC disputed the Department's contention that the addition of "error" to the rule is consistent with Minn. Stat. § 256B.064, subd. 1c. It pointed out that the statute allows the Department to obtain monetary recovery from a *vendor* who has been improperly paid as a result of fraud, theft, abuse, or as a result of vendor or Department error. As MDLC argued, the statute does not extend to errors made by *program participants* and that the Department does not have the legal authority to terminate the benefits of a recipient who has made a mistake.[43] MDLC expressed concern that a contrary rule, if permitted by the statute, could have "disastrous consequences" for disabled individuals who are using self-directed services and attempting to navigate a complex regulatory system on their own.[44]

40. The Department defends the proposed addition of "error" to the SIRS rules by pointing to two other places in the current rules that allow for monetary recovery by the Department in the case of error. Minn. R. 9505.0465, subp. 1, directs the Department to recover "erroneously" obtained payments and allows monetary recovery

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[40] SONAR at 8.

[41] Public Exs. 1, 6, and 7.

[42] Public Ex. 1.

[43] Public Ex. 7.

[44] Public Ex. 7.

under the medical assistance program for "intentional and unintentional error on the part of the provider or state or local welfare agency." In addition, Minn. R. 9505.2215, subp. 1, directs the commissioner to seek monetary recovery "from a recipient, if payment for a health service provided under a program was the result of fraud, theft, or abuse, or error on the part of the recipient absent a showing that recovery would, in that particular case, be unreasonable or unfair."[45]

41. As for the suggestions that the Department include a regulatory definition of the term "error," the Department responded that the term is intended to have its common and approved usage. The Department cited to the *Minnesota Revisor's Manual With Styles and Forms* (2002 Edition), which advises that the word usage should be governed by *Merriam-Webster's Collegiate Dictionary*, unless otherwise governed by law or the *Minnesota Revisor's Manual*. The Department went on to state that the definition of "error" in *Merriam-Webster's Collegiate Dictionary* does not include willful misconduct or actions involving criminal intent. Accordingly, the Department reasons, claims that involve inadvertent mistakes would not a prompt criminal prosecution.[46]

42. Without minimizing the legitimate concerns expressed by the commentators, the Administrative Law Judge finds that the proposed addition of "error" is consistent with both state and federal program integrity requirements and is needed and reasonable.

Part 9505.2165, subpart 2

43. Subpart 2 defines "abuse" on the part of a vendor as "a pattern of practices that are inconsistent with sound fiscal, business, or health service practices, and that result in unnecessary costs to the programs or in reimbursements for services that are not medically necessary or that fail to meet professionally recognized standards for health service." This regulation then proceeds to list a series of inappropriate practices that are deemed to be abuse by a vendor. The Department proposes a number of changes to the list of practices that constitute abuse.

Deletion of the terms "repeated" and "repeatedly"

44. The Department proposes to amend the definition of "abuse" by removing the term "repeated" in subitems (1) to (6), (10), (13), (17), and (18), on the basis that the term is not needed because 42 C.F.R. § 455.2 only requires one unnecessary program payment to constitute abuse.

45. Several of the commentators objected to the deletion of "repeated" from the definition of "abuse" and recommended that the Department restore the word to the definition.[47] These commentators worried that the removal of the term would create an unacceptable standard for criminal prosecution of vendors for a single instance of abuse. Homeward Bound contended that the term "repeated" reinforced the meaning of

[45] Department's Initial Post-Hearing Comments, at 2-3 (November 20, 2007).

[46] *Id.*

[47] Public Exs. 1, 3, 4, and 6.

"pattern of practices" as "abuse".[48] REM noted that it had argued, successfully, as to the importance of including the word "repeated" in the rules the last time that the SIRS rules were amended.[49] The Minnesota Health & Housing Alliance (MHHA) and Phoenix Medical Services asserted that use of the term "repeated" finds support in both the Federal Regulations and Minnesota Statutes.[50]

46. In its response, the Department reiterated its argument that the word is not necessary because the current rule refers to a pattern of practice. DHS stated that while it does not intend to impose strict penalties for single instances of overpayment, given the large amount of public concern over the removal of the word "repeated," it agreed to restore the term in the rule language.[51]

47. The Administrative Law Judge finds that the withdrawal of the proposed deletion returns the rules to their original form and does not represent a substantial change.

Addition of the term "service agreement"

48. The Department proposes to add the term "service agreement" to subitem (13) of subpart 2 so as to expand the list of items that may not be obtained by using false information. The Department notes that recipients are not now permitted to obtain through a state program services which are not medically necessary. Because a "service agreement" details which services will be provided, DHS argues that its addition adds clarity to a list that includes prior authorizations, inpatient hospital admission certifications and surgical opinions.[52]

49. Care Providers of Minnesota objected to the inclusion of "service agreement" in subitem (13) on the basis that the term is not otherwise defined and undermines the clarity of the existing rule.[53] Care Providers argues that only counties, and not providers, are authorized to submit information to obtain a service agreement;[54] and that as a result, adding this term to the SIRS rules makes the revised regulations unclear. Care Providers recommends that the Department either specially define "service agreement" or withdraw the term from the rule language in subitem (13).

50. The Department responded that the term "service agreement" appears in other laws and rules regulating health care programs in Minnesota. The Department generally defines the term as a document that is entered on-line into the Department's MMIS payment system and which identifies service, provider and payment information

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[48] Public Ex. 1.

[49] Public Ex. 4.

[50] Public Exs. 3 and 6.

[51] Department's Initial Post-Hearing Comments, at 3-4.

[52] SONAR at 8.

[53] Public Ex. 5.

[54] *Id; see also, In the Matter of the SIRS Appeal of Grove Homes, Inc.*, OAH Docket No. 15-1800-15307-2 (November 30, 2004), *accepted with modifications on other grounds*, Commissioner Order (March 2, 2006).

for a recipient receiving home care or waiver services.[55] The Department declined to define the term in the proposed rules because it is "commonly used" and understood.

51. While a regulatory definition of this term of art might be helpful to the regulated parties, the Administrative Law Judge finds that the proposed addition is not unreasonably vague or misleading. In furtherance of the Department's important role in combating fraud and abuse, the addition of the term "service agreement" is needed and reasonable.

Deletion of the phrase "knowingly and willfully"

52. In subitem (14), the Department seeks to delete the phrase "knowingly and willfully" from the abusive practice of "knowingly and willfully submitting a false or fraudulent application for provider status." The Department asserts that the phrase is unnecessary because the federal definition of "abuse" does not require knowing or willful conduct in the submission of a false application.[56]

53. Several commentators objected to the removal of this phrase.[57] Homeward Bound expressed concern that deleting "knowingly and willfully" would create situations where one incorrect piece of information would make the application "false" and actionable as abuse.[58] Most of those objecting to this proposal suggested replacing the phrase with the word "intentionally."

54. In its response, the Department stated that it specifically intended to create two possibilities to resolve an instance of abuse related to filing a false or fraudulent application. Without the phrase "knowingly and willfully," a claim of abuse could be quickly resolved by a civil action for money damages, short of a criminal prosecution. The Department proposes to resolve the more serious cases, where there is knowing and willful misconduct, under the "fraud" definition of subpart 4, item B. The definition of "fraud," continues DHS, is aimed at knowing and willful misconduct.[59]

55. The Department has demonstrated that the proposed segmenting of abuse claims that may be pursued civilly, from those that may be pursued through criminal prosecutions, is needed and reasonable.

Item A, subitem 21

56. The Department proposes to add the following conduct to the list of practices that constitute abuse: "billing for services that were not provided in compliance with regulatory agency requirements or that were outside of the scope of the vendor's license." The Department argues that the language is needed to ensure that services are provided within the scope of a vendor's professional license (pursuant to Minn. Stat.

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[55] Department's Initial Post-Hearing Comments, at 4.

[56] SONAR at 8. *See also,* 42 C.F.R. § 455.2.

[57] Public Exs. 1, 4, 5, and 6.

[58] Public Ex. 1.

[59] Department's Initial Post-Hearing Comments, at 5.

§ 256B.02) and that vendors who do not need licensure still meet applicable regulatory requirements.[60]

57. The proposed addition spurred comments from several organizations. Phoenix Medical Services, for example, noted that local vendors rely upon clear direction from the Department as to the proper practice and encouraged it to define the term "regulatory agency requirements" with more precision.[61]

58. Care Providers of Minnesota and MHHA expressed concerns over the breadth of the proposed disqualification. The associations noted that nursing facilities are among the most regulated businesses in Minnesota and that it is not uncommon for a facility to be out of compliance with at least one of these regulations, on any given day. Yet, notwithstanding this technical noncompliance, such facilities may still lawfully provide care to their residents.[62] Further still, such noncompliance may have little or no relationship to the services that are being billed to a government program.[63]

59. Care Providers further argues that the proposed language invites other programmatic difficulties – namely, that the addition might be preempted by federal law, because the Centers for Medicare and Medicaid Services are authorized to seek remedies against nursing facilities that are out of "substantial compliance" with federal regulations; that it intrudes upon facility survey functions that state and federal law confer upon the Minnesota Department of Health; and that it could lead to inconsistent or duplicative results between SIRS appeals and rate appeals.

60. MHHA and Care Providers jointly proposed alternate language to address their concerns: "billing for services that were outside the scope of the vendor's license or, in the case of a vendor that is not required to hold a license, billing by such a vendor for services that the vendor is not authorized to provide under applicable regulatory agency requirements."[64]

61. The Department responded to these concerns by reiterating its intention that subitem (21) instruct vendors that they are required to follow regulatory requirements in order to be eligible to receive Minnesota Health Care Program payments. All participating providers must agree to "comply with all federal and state statutes relating to the delivery of services to individuals and to the submission of claims for such services."[65] With this restatement of its earlier stance, however, the Department has agreed to accept the alternate language proposed by MHHA and Care Providers of Minnesota.[66]

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[60] SONAR at 9.

[61] Public Ex. 6.

[62] Public Exs. 3 and 5.

[63] Public Exs. 3 and 5.

[64] Public Exs. 3 and 5.

[65] Department's Initial Post-Hearing Comments, at 5-6.

[66] Department's Post-Hearing Rebuttal Comments, at 4 (November 29, 2007).

62. The Administrative Law Judge finds that the alternate language proposed by the commentators and accepted by the Department adds beneficial clarity to the rule, is needed and reasonable, and does not make a substantial change in the proposed rules.

Item A, subitem (22)

63. The Department proposes to add the following conduct to the list of practices that constitute abuse: "billing for services in a manner that circumvents the program's spenddown requirement." The rationale for this additional item is to prevent vendors from entering into illicit agreements under which the provider would bill MHCP for services it has not provided in order to cover the spenddown amount owed by the recipient.[67]

64. REM commented on this provision and suggested that the Department consider adding the word "intentionally" at the beginning of subitem (22) because it is often not clear, perhaps for months, the precise mix of patient and provider responsibilities under the spenddown requirements.[68]

65. In its response, the Department declined to accept the addition of the word "intentionally" to this subitem, relying upon the arguments it advanced in the SONAR.[69]

66. The Administrative Law Judge finds that subitem (22) is needed and reasonable and that the Department has provided adequate rationale for the proposed rule.

Part 9505.2165, subpart 6d

67. The Department proposes to add a definition of "lockout" as follows: "Lockout" means excluding or limiting for a reasonable time the scope of health services for which a vendor may receive payment through a program." The Department seeks to add this definition because it would permit the Department to limit vendors without completely excluding them from the program.[70] The Department asserts that such a provision would protect the integrity of the program because the Department could curb a provider's abusive behaviors, yet allow that provider to continue providing services in other areas where no abuse is present. Federal regulations permit such lockouts.[71]

68. Phoenix Medical Services objected to the use of the phrase "for a reasonable time" as too subjective and suggested that the Department draft a better definition and guidelines as to how the procedure would be employed.[72] The Department responded by directing the commentator to 42 C.F.R. § 431.54 (f) where

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[67] SONAR at 9.

[68] Public Ex. 4.

[69] Department's Post-Hearing Rebuttal Comments, at 4.

[70] SONAR at 12.

[71] *See,* 42 C.F.R § 431.54 (f) (2006).

[72] Public Ex. 6.

"lockout of providers" is discussed and the phrase "for a reasonable period of time" is used to limit a Medicaid provider's participation in the federal program.[73]

69. While the Department's choice of borrowing the phrase "reasonable time" from the federal regulations suggests that it was not seeking to aggrandize its own powers, this is not the end of our inquiry. OAH must separately determine whether the agency application of the lockout powers can be guided by meaningful standards. The proposed rule contains no such standards; but one is possible. Iowa officials, for example, have suggested that a reasonable time period for a lockout of a provider is, at a minimum, the time needed for the provider to successfully implement a plan of correction.[74] Similarly, Virginia has placed a 24-month limit on the duration of the restrictions that may be imposed.[75] The proposed rule is not approved.

Part 9505.2175, subpart 6

70. The Administrative Law Judge recommends an amendment to subpart 6 of part 9505.2175 so as to correct a grammatical error. This rendering of this recommendation does not amount to a finding that the proposed rules are legally defective, nor would adoption of this revision make the rules substantially different than originally proposed. The Administrative Law Judge proposes the following change to subpart 6 for the Department's review and consideration: "Rehabilitative and therapeutic service records must meet the requirements of subparts 1 and 2, ~~and~~ must meet the criteria in part 9505.0412, and must document . . . ."

Part 9505.2180, subpart 1, item H

71. The Department proposes to amend subpart 1 relating to the financial records that are required of participating vendors. A participating vendor is now required to maintain employee records for its current and past employees, for a period of five years. These records must include such information as the employee's name, salary, qualifications, position description, job title, dates of employment and current home address. The Department proposes to add "employee time sheets" to the list of information that must be maintained. DHS argues that the addition is reasonable because it aids Department auditors in verifying whether services were provided and appropriately billed. DHS contends that this information will likewise contribute to efforts to maintain compliance with federal regulations.[76]

72. Homeward Bound took exception to this proposed addition to the rules. It asserted that "exempt staff" under the wage and hour laws often do not keep detailed time records; other than to record the days on which the staff member worked. Further,

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[73] Department's Post-Hearing Rebuttal Comments, at 5.

[74] *See,* Draft *Amount, Duration and Scope of Medical and Remedial Care and Services Provided to the Categorically Needy*, at 4 (Iowa Dep't of Human Servs., Iowa Medicaid Enterprise) (http://www.ime.state.ia.us/docs/MayAttachment3.1-A.doc).

[75] *Compare,* 12 Virginia Administrative Code 30-130-820 (E) (2) ("Client Medical Management Program for Providers").

[76] SONAR at 24. *See also*, 42 C.F.R. §§ 455.1 and 455.20 (a) (2006). These provisions require that the Department have a method of verifying whether services billed by providers were received by recipients.

Homeward Bound wondered whether, under state and federal labor laws, providers could insist that exempt employees submit detailed time records. In accordance with its concern, Homeward Bound recommended that the record-keeping requirements be limited to "non-exempt employee's time sheets."[77]

73. Similarly, MHHA objected to the proposed inclusion of employee time records. MHHA disputed the Department's claim that time sheets are necessary to verify whether services were provided or appropriately billed. It argued that the retained records might only be useful in "fee-for-service" cases. Continued MHHA: "It does not make sense in the 'bundled' or 'all-inclusive' billing arena because the payment is for a day of services that includes a broad array of assistance and services."[78] Furthermore, MHHA pointed to Minn. Stat. § 256B.432, subd. 8, which relates to the records that are needed to document long-term care facility payrolls. This statute provides that if time and attendance records are stored as automated data, "*summary* data must be available for viewing and printing."[79] MHHA argued that a regulation which required vendors to maintain *individual* time sheets exceeds the regulatory burdens that are imposed by statute. Accordingly, MHHA suggested that the Department add the following sentence at the end of item H: "Time sheets are not required of certified nursing facilities whose time and attendance records are stored as automated data."[80]

74. The Department declined to make either of the suggested changes and responded by providing examples of instances where employee time sheets were necessary to ascertain whether and when services were provided to particular recipients.[81] DHS noted that on numerous occasions SIRS has pursued cases in which an health care staff have caused hours to be submitted for payment by the MHCP, by two different vendors, for the same time of work day. DHS argues that by reviewing the employee time sheets, SIRS was able to determine which hours were, in fact, rendered by the employee and at a particular work site. The Department goes on to state that nursing home providers would not be affected by hourly time record requirements. Because individual nursing services are not time-based, but rather "included in the *per diem* payment made to a nursing home," DHS notes that these services would not underlie a SIRS claim for recovery.[82]

75. The Administrative Law Judge finds that the Department has justified the inclusion of employee time sheets in the information that vendors are required to maintain on their employees. This new requirement is in keeping with the purpose and intent of the relevant federal regulations and is needed and reasonable.

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[77] Public Ex. 1.

[78] Public Ex. 3.

[79] Minn. Stat. § 256B.432 (8) (2006) (Emphasis added). MHHA stated that this language was enacted by the legislature in 1998 to prevent the Department from requiring facilities that had automated their systems to maintain a paper-based system of time sheets for the sole purpose of having the supervisor and employee's signatures available to the DHS field auditors, as was required for paper time sheets.

[80] Public Ex. 3.

[81] Department's Initial Post-Hearing Comments, at 10.

[82] *Id.*

Part 9505.2185, subpart 2

76. The Department proposes to make several amendments to subpart 2; one of which, relating to access to provider records, drew comment from interested parties. The Department proposes to alter the current requirement that a vendor grant it access to "health service and financial records" during the "vendor's regular business hours," so as to require that these records be made available during the "department's normal business hours."

77. DHS recommends this change so as to ensure that the Department has access to health service and financial records in compliance with Minn. Stat. § 256B.064, subd. 1a (5). This statute allows the commissioner to impose sanctions against a vendor for "refusal to grant the state agency access during regular business hours to examine all records necessary to disclose the extent of services provided to program recipients and appropriateness of claims for payment." The Department suggests that this change will not inconvenience most providers because the business hours of most providers are similar to those of the Department. According to the Department, the change is needed because it will prohibit providers from denying access to records by claiming that the records are available to the Department's auditors only during limited or unusual times of the day. Finally, the Department argues that the proposed change is consistent with the requirements of federal regulations.[83]

78. Homeward Bound objected to the proposed change because the Department has not stated in its materials (nor in its reply to comments) which hours are the Department's "normal business hours."[84] Homeward Bound states that its employees have had exchanges with the Department officials at a variety of different times of day – ranging from 6:00 a.m. to 8:00 p.m. Accordingly, to clarify the proposed rule, Homeward Bound urged that the phrase "during the department's normal business hours" be deleted and replaced with "8 am – 5 pm, Monday through Friday, excluding state and federal holidays."

79. MHHA combined its comments regarding subpart 2, with its comments under part 9505.2180, subpart 1, item H – renewing its argument for the proposed substitute language discussed in the previous section.

80. The Department responded that it is required by Minn. Stat. § 256B.27, subd. 3, to give 24 hours notice prior to seeking access to a vendor's records and that its usual practice is to make an appointment with a vendor at least 24 hours in advance of examining sought-after records. The Department further argues that the language of Minn. Stat. § 256B.064, subd. 1a (5) clearly supports the Department's ability to have access during the Department's normal business hours.[85]

81. The Administrative Law Judge disagrees. Minn. Stat. § 256B.064, subd. 1a, clause 5 includes a more general reference to "regular business hours" – ones which apparently occur in Minnesota widely and regularly, and without favor for the

[83] SONAR at 25. *See also*, 42 C.F.R. § 431.107 (b) (2006).

[84] Public Ex. 1.

[85] Department's Initial Post-Hearing Comments, at 10-11.

preference of particular state agencies, or private companies, on when to operate. This view that the state's general practice of "regular business hours" was intended by the Minnesota Legislature when enacting Minn. Stat. § 256B.064, subd. 1a, clause 5, gains support when one notes that the unadorned and undefined phrase "regular business hours" appears in more than two dozen different statutes – on a wide range of matters from the review of health care records, to the inspection of "agricultural seeds and grains," to financial audits of public transit authorities.[86] Likewise significant, in a statute relating to the provision of emergency mental health services, which is similarly administered by the Department, the Legislature distinguished between "regular business hours" and "evenings, weekends and holidays."[87] When read together, these statutes suggest that the Legislature was pointing to a commonplace, widely-held and "regular" view of operating hours.

82. Lastly, the federal regulations relied upon by the Department do not require that "regular business hours" be defined in terms of the agency's preferred practice.

83. In such a circumstance, therefore, the permissible choices remaining for the agency are to attempt to set out in a rule what "regular business hours" are in Minnesota, either in this or a follow-on rulemaking, or to develop this understanding incrementally through contested cases.[88] While, in such a circumstance, adopting of the text urged by Homeward Bound appears to be an accurate, reasonable and efficient alternative, the regulatory pathway is one for the Department to choose.

84. However, to the extent that the Department has proposed to define "regular business hours" as any hours during which DHS officials are known to work, this rule is disapproved.

Part 9505.2195

85. The Department proposes to amend part 9505.2195 relating to the copying vendor records in the following manner:

> Photocopying shall be done on the vendor's premises <u>on the day of the audit</u> unless removal is specifically permitted by the vendor. ~~If a vendor fails to allow the department to use the department's equipment to photocopy or duplicate any health service or financial record on the premises, the vendor must furnish copies at the vendor's expense within~~

[86] *See, e.g.,* Minn. Stat. §§ 21.75 (2) (1); 144A.45 (2) (a) (2); 458A.24 (4) (2006).

[87] *Compare,* Minn. Stat. § 245.4879 (2) (2006).

[88] *See, Eagle Lake of Becker County Lake Ass'n v. Becker County Board of Commissioners*, Case No. A07-112, slip op. at 7 (Minn. App. Sept. 18, 2007) ("An administrative agency's exercise of the adjudicative function to evolve a policy on a case-by-case basis, even if it is not yet embodied in a legislative rule, is well recognized.... '[A]djudicated cases may and do serve as vehicles for the formulation of agency policies, which are applied and announced therein, and . . . such cases generally provide a guide to action that the agency may be expected to take in future cases.' And regardless of whether policies or standards are specifically spelled out in rules or regulations, agencies must have the discretion to carry out their judicial function and decide issues at hand") (citing cases) (http://www.lawlibrary.state.mn.us/archive/ctappub/0709/opa070112-0918.htm).

~~two weeks of a request for copies by the department.~~ If requested, a vendor must help the department duplicate any health service record or financial record, including hard copy or electronically stored data on the day of the audit.

86. The Department seeks these changes so as to prohibit vendors from frustrating the progress of DHS Audits by refusing to allow copying of relevant records or permitting unscrupulous vendors time to "create" records during an unreasonably slow process for copying other materials.[89] The Department justifies adding "on the day of the audit" because a vendor will always be given at least 24 hours notice that the Department will require access records. It argues that a vendor will have plenty of time to assemble the necessary records and resources for an audit. The Department adds that the proposed changes are necessary to comply with federal regulations.

87. Homeward Bound and Phoenix Medical Services objected to the proposed language "on the day of the audit." Homeward Bound argued that because some of the individuals receiving care have many needs, the related service records are "enormously large." It asserts that it may not be possible for its staff to prepare and complete the copying of such portfolios on the day of the audit – particularly if Department officials identify there interest in a cache of large records late in the work day.[90] Accordingly, Homeward Bound recommended that the Department change the requirement to permit 3 days for the completion of copying.

88. Phoenix Medical Services also suggested that the "on the day of the audit" requirement may be unreasonable if records were stored off-site, or access to the records required the availability of a particular system administrator or other third party pursuant to HIPAA regulations.[91] Phoenix Medical Services suggested that the Department reword the language so as to make it consistent with HIPAA.

89. The Department declined to adopt either of the suggested changes. In response to Homeward Bound's comments, the Department stated that when the SIRS team conducts an audit that requires the review and copying of large medical and financial records, the auditors will often be on the vendor's premises for more than three days – a period which is adequate time to duplicate the records.[92] The Department countered Phoenix Medical Services' arguments by pointing out that federal patient record privacy requirements do not prohibit the copying of provider records, but instead specifically provide for the copying of medical records that are necessary for an investigation.[93]

90. The Administrative Law Judge finds that the Department has made a permissible policy choice to limit the amount of time it takes for the Department to obtain copies of these records. While not minimizing the potential burdens that are outlined by

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[89] SONAR at 25.

[90] Public Ex. 1.

[91] Public Ex. 6.

[92] Department's Initial Post-Hearing Comments, at 11.

[93] Department's Post-Hearing Rebuttal Comments, at 9-10.

Homeward Bound and Phoenix Medical Services, in the view of the undersigned a vendor subject to audit has a reasonable regulatory alternative within a given work day – the rules provide that the vendor may either copy the records, or effect a surrender of the records to Department officials, in order to meet the regulatory requirement.[94] The proposed change to part 9505.2195 is needed and reasonable.

Restricted Recipient Program
Part 9505.2165, subpart 10b
Part 9505.2207
Part 9505.2238

91. The Restricted Recipient Program is a health care access program for recipients who have earlier failed to comply with the requirements of the general, full-access program.[95] As the moniker implies, a recipient who is placed in the Restricted Recipient Program is limited in the types of providers they may use and services they may receive – typically for a period between 24 and 36 months.[96] These rules were proposed to distinguish between a vendor penalty, as discussed in part 9505.2205, and a recipient penalty. In its SONAR, DHS summarized the program in this way:

> When a recipient is placed in the Restricted Recipients Program the recipient does not lose benefits. Placement in the program is not a denial, reduction or termination of benefits. However, a vendor penalty usually results in a payment of money by the vendor to the state, a restriction on their services or termination of their vendor status.[97]

92. Arc Greater Twin Cities expressed concern about the unintended consequences of the proposed amendments to a recipient's due process rights.[98] Pointing to the Department's rationale quoted above, Arc notes that a recipient who was placed in the Restricted Recipient Program might not have grounds for an appeal under the Fair Hearing rules. Those rules permit appeals in cases where services have been denied, reduced or terminated by the Department. Placement in the Restricted Recipient Program could, argues Arc, limit the types of services provided to a recipient and thereby negatively impact the recipient's health, safety, and welfare.[99]

93. The Department responded that none of the proposed changes abridge a recipient's right to notice and appeal of a decision to place the recipient in restricted status.[100] The current rules at parts 9505.2230 and 9505.2245, subpart 2, specifically address a recipient's right to appeal an agency decision. Neither of those rule parts is proposed for change. Minn. Stat. § 256.045 likewise protects a recipient right to appeal.

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[94] *See,* Ex. B at 17.

[95] *See* proposed rules at parts 9505.2165, subp. 10b; 9505.2207; and 9505.2238.

[96] *See* proposed rules at Minn. R. 9505.2165, subp. 10b.

[97] SONAR at 28.

[98] Public Ex. 9.

[99] *Id.*

[100] *See,* Department's Initial Post-Hearing Comments, at 13; and Department's Post-Hearing Rebuttal Comments, at 16.

94. The Administrative Law Judge agrees that nothing in the proposed rules abridges a recipient's notice and appeal rights. Further the proposed rules are needed and reasonable efforts to ensure integrity of existing programs.

95. With that said, however, the Administrative Law Judge recommends a change in subpart 3 of part 9505.2238 to improve the clarity of the subpart and to correct a typographical error. This recommendation is not a defect in the rules and will not make the rules substantially different than originally proposed. The Administrative Law Judge proposes the following rearrangement of the wording of subpart 3:

> **Placement renewal.** After a recipient has completed an initial 24-month period of eligibility in the restricted recipient program, the department may renew the recipient's placement in the restricted recipient program under part ~~9509.2165~~, 9505.2165 subpart 2, item C, by sending written notice to the recipient. Renewal of the recipient's placement in the restricted recipient program shall be for an additional period of 36 months of eligibility. If the recipient's placement is not renewed, the recipient shall be notified by the department that the recipient's participation in the restricted recipient program is over. The recipient will remain placed in the restricted recipient program pending the resolution of an appeal of the placement renewal.

Part 9505.2220, subpart 1

96. The Department proposes revisions to current rule which would authorize it to use extrapolations from "systematic random samples of claims submitted by the provider and paid by the program" to calculate the monetary recovery that is due the Department. The Department would be authorized to use these methods in instances where: (a) its review includes services rendered to 50 or more program participants; (b) there are more than 1,000 claims to be reviewed; or (c) a complete re-adjudication would be excessively costly or impractical. As to the meaning of this last authorization, the Department's proposed rule would permit the use of sampling techniques in those cases where the costs of a complete re-adjudication would be "disproportionate" to the amounts that may be recovered or "is otherwise impractical."

97. As the Minnesota Supreme Court has instructed, a regulation must furnish:

> a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.[101]

In the view of the Administrative Law Judge, the proposed regulatory standards of "disproportionality" and "impracticality" are not sufficiently definite so as to guide Department officials in the application of sampling methods in specific cases. Because the effort requiring a complete readjudication of cases could seem "disproportionate" or

[101] *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949).

"impractical" in all or none of the cases presented to agency officials, depending entirely upon the private views of the decision-maker, such a rule does not take effect upon its own terms, but rather the whim or caprice of the administrative officer. Because the proposed rule does not provide a sufficiently clear standard for agency action, the rule is both defective and unreasonable.

Part 9505.2220, subpart 3

98. The proposed revision that drew the most detailed and vigorous response from commentators, involved the Department's proposal to broaden the range of sampling techniques that may be employed to estimate the amounts that are due to DHS in matters that are not separately appealed by the provider. The current rule provides that the sampling techniques may be employed where:

(a) sample claims have an equal chance of being selected for the sample;

(b) samples are drawn from relevant intervals of time under review;

(c) sampling procedures are in accord with those detailed in William G. Cochran's treatise, *Sampling Techniques*; and,

(d) the sample size be sufficiently large so that there is a "two-sided 95 percent confidence interval" of the amount that would be otherwise recovered by the Department if a full audit of the records were undertaken.

In the proposed amendments, DHS eliminates the requirements that sample claims have an equal chance of being selected for the sample and that the sample sizes include enough claims to permit a two-sided 95 percent confidence interval. Under the proposed rule, a wider range of sampling techniques, which do not necessarily include the now-required features, could be used in estimating amounts owed to DHS.

99. As several commentators noted, however, the existing rule enjoys the confidence of the regulated parties – particularly health care providers – because it implied that the agency had foresworn the possibility that it would use self-serving calculation methods when estimating the amounts that were to be refunded. As one commentator summarized, a "two-sided 95 percent confidence interval" equals not only a widely-regarded level of statistical precision, on average, it tends to both understate the amounts of the government's recovery when compared to the "true overpayment," and sharply reduce the risk that the estimated amount sought by the DHS will exceed the "true overpayment."[102] In this way, from the prospective of the regulated parties, the existing rule formed a grand bargain: DHS was entitled to avoid the costs, bother and expense of establishing the "true overpayment" through the use of sampling techniques, but the risk that these simpler methods would result in excessive recoveries was quite low.

100. While there may be much to commend retaining the existing set of restrictions, the Office of Administrative Hearings does not sit as a super-Legislature in rulemaking matters. This Office is not directed or authorized to select the rulemaking alternative that it regards as the "best policy choice." The legal review by OAH is far

[102] *See, e.g.,* Public Ex. 4, Comments of Robert E. Sherman, Ph.D, at 3.

more limited in scope. Comparing the Legislature's direction that the Department make "uniform rules" for the lawful, "efficient, economical, and impartial" administration of the medical assistance program, with the sampling standards that remain in the proposed rules, the undersigned cannot conclude either that these rules exceed the agency's delegated authority or that they are arbitrary and capricious.

101. While less definitive than the existing rule, the proposed regulations are not so indefinite as to confer standardless discretion upon DHS when it designs samples of claims for review. Indeed, among the boundaries on the exercise of official discretion include requirements that simple random samples are to be used unless there is an official determination that other sample designs "are more likely to lead to greater precision, or a closer approximation to the population mean;" sampling techniques must be consonant with the procedures found in the Cochran treatise; and sample sizes must reflect the minimum number of claims as specified by the revised rule. In the view of the undersigned, these restrictions are genuine standards of action "to control and guide administrative officers," and therefore may be selected by DHS among the range of sampling methods that are available to it. The proposed revisions to Part 9505.2220, subpart 3, are approved.

102. After the close of the initial comment period, but before the close of the rulemaking record, the Department noted that it was proposing still further revisions to subpart 3, so as to recover "the federal share of overpayment as determined by the federal government under a random sample extrapolation method …." Care Providers of Minnesota objected to these revisions as amounting to a substantial change beyond the scope of the earlier-announced proposals, and one which threatened to "short-circuit [the agency's] own due process procedures for recovering provider payments …."[103]

103. While the late-breaking proposals from the Department were not optimally timed, they do relate to the use of sampling techniques to recover overpayments made under federally-supported programs and the state's efforts to maintain the federal sovereign's expectations for program integrity. In the view of the undersigned, the new proposals are the type of subject that "persons who will be affected by the rule should have understood" that the rulemaking proceeding could address; the subject matter of the rule or issues determined by the rule are not different from the subject matter or issues contained in the notice of hearing; and the effects of the rule are not markedly different from the effects of the proposed rule contained in the notice of hearing.[104] The additions to subpart 3 are thus not substantial changes to the earlier-announced amendments.

104. Likewise unpersuasive is Care Providers' argument that these amendments "short-circuit" the due process interests of Minnesota providers, because the providers do not participate in, or have a clear right to challenge, the audit results that underlie the federal claims for overpayment. The argument is unavailing as to the propriety of the general rule because it is either, at worst, not true; or at best, premature.

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[103] *See,* Public Ex. 10, Letter of Samuel D. Orbovich (December 6, 2007).

[104] *Compare,* Minn. Stat. § 14.05, subd. 2.

As the undersigned reads the regulatory proposals from the Department, the calculation of monetary recovery may result from the use of sampling techniques if the presumption in favor of that amount of recovery "is not rebutted by the vendor in the appeal process."[105] The retention of the appeal process in the proposed rule suggests that providers have a full and very robust set of processes to challenge any overstated claims for recovery. Further, if, for some reason that is not apparent on the face of the rule, recovery of the federal share of overpayments denies providers due process, the specifics of how those rights are infringed are better detailed in a contested case (or a request for declaratory relief) than in a rulemaking proceeding. These "as applied" due process claims are not best catalogued or resolved in this proceeding.[106]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department of Human Services gave proper notice of the hearing in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule, with the exception noted in Finding 15, which was found to be harmless error.

3. The Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii), except as noted in Findings 84 and 97.

4. The Department has demonstrated the need for and reasonableness of the other portions of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii), except as noted in Findings 69, 84 and 97.

5. The modifications to the proposed rules that were offered by the Department after publication in the State Register do not make the rules substantially different from the proposed rule within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

6. Any Findings that are more properly characterized as Conclusions are hereby adopted as such and incorporated by reference. Any Conclusions that are more properly characterized as Findings are hereby adopted as such and incorporated by reference.

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[105] *See,* Ex. B at 22.

[106] *See, e.g., Mammenga,* 442 N.W.2d at 789 ("Sometimes, in applying a rule in a contested case, a factual situation that did not surface during the rulemaking process will come to light and show that the rule as applied to the newly revealed situation lacks a rational connection to the legislative objectives. It is in this sense that it is sometimes said that a rule is invalid 'as applied'") (citing *Broen Memorial Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 440 (Minn.App.1985)); *accord, Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 104-05 (Minn. App.) *review denied* (Minn. 1991).

7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude, and should not discourage, the Department from further modification of the proposed rules based upon an examination of the public comments; provided that the rule finally adopted is based upon the facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted, except where noted otherwise.

Dated this 31st day of December, 2007.

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

NOTICE

The Department must wait at least five working days before taking any final action on the rules. During that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minnesota Rules, part 1400.2100, and Minnesota Statutes, section 14.15, subdivisions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions that will correct the defects. If the Department elects to make any changes to the rule, it must resubmit the rule to the Chief Administrative Law Judge for a review of those changes before adopting the rule.

However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either follow the Chief Administrative Law Judge's suggested actions to cure the defects or, if the Department does not elect to follow the suggested actions, it must submit the proposed rule to the Legislative Coordinating Commission, and the House of Representatives and Senate Policy Committees with primary jurisdiction over state governmental operations for the advice of the Commission and Committees.

When the rule is filed with the Secretary of State by the Office of Administrative Hearings, the Department must give notice to all persons who requested that they be informed of the filing.